In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-82

MICHAEL ANTHONY TOMEO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Colorado, petitioner was convicted of violations of 18 U.S.C. 1084 on two counts charging that, having been engaged in the business of wagering, he knowingly used and caused the use of interstate telephone facilities for the transmission of wagers or information assisting in the placing of wagers on sporting events. He was sentenced to consecutive prison terms of two years and one year, re-

spectively. The court of appeals affirmed (Pet. App. 1a-5a).

The evidence is not in dispute and is summarized in the opinion below (Pet. App. 2a). The fact that petitioner was in the business of wagering was established by three witnesses who testified to having personally placed large bets with petitioner within the State of Colorado on a number of occasions during the relevant periods charged in the indictment. (See Tr. 18-21, 24-26, 32.) [1] On the interstate element, Mr. Huber, a Wisconsin businessman, who had known petitioner since 1963 or 1964 (Tr. 33-34), testified to having used interstate telephone facilities to call petitioner to obtain point spreads and to place bets (Tr. 40). Huber testified that in October 1968 he met petitioner in Denver at a restaurant and asked him where he could telephone petitioner when Huber was back in Wisconsin. Petitioner gave Huber a telephone number in Denver to use for this purpose. Huber thereafter used the number to make calls to petitioner from Wisconsin to obtain the line and to place bets on football games two or three times per week throughout the periods charged in the indictment (Tr. 36-40). At one point during this time petitioner advised Huber that the telephone number had been changed because "the heat was on" (Tr. 43-44).

Petitioner contends that certiorari should be granted to resolve conflict among the circuits on the question whether 18 U.S.C. 1084(a) (Pet. 3) prohibits the

[1] "Tr." refers to the transcript of the proceedings at trial, a copy of which we are filing with the Clerk.

receiving as well as the sending of bets and wagering information by interstate wire facilities. We concede that that is a dispute among the circuits on the reading of the statute, but the present case does not properly frame the issue for resolution.

In *Sagansky* v. *United States*, 358 F.2d 195, certiorari denied, 385 U.S. 816, which the Tenth Circuit below followed, the First Circuit held that the term "transmission" encompassed the use of a telephone to receive a bet. By contrast, in *United States* v. *Stonehouse*, 452 F.2d 455, the Seventh Circuit reversed the conviction of a tavern owner engaged in the business of wagering who had a Western Union ticker tape printer in his place of business, on the ground that Section 1084 applies only to the sending of wagering information.[2]

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[2] However the Seventh Circuit was at pains to distinguish the ticker tape machine from the telephone, the "wire communication facility" involved in this case and *Sagansky* (452 F. 2d at 456):

> The issue is starkly presented because appellant's ticker tape enabled him to receive, but not to transmit, information which assisted in the placing of bets on sports events. The ticker tape is, therefore, unlike a telephone which provides a means for communication between two persons, each of whom normally transmits, as well as receives, some information during any use of the facility.

Petitioner also alleges a conflict with this Court's *per curiam* affirmance, 376 U.S. 782, of the decision of a three-judge district court construing Section 1084(d) in *Telephone News System, Inc.* v. *Illinois Bell Telephone Co.*, 220 F. Supp. 621 (N.D. Ill.). In the course of its decision the district court did adopt the view, subsequently adhered to by the Seventh Circuit in *Stonehouse, supra*, that Section 1084(a) reached only the sending of wagering information by telephone. See 220 F. Supp. at 638. This issue, however, was not an integral part of the district court's holding and was not one of the

However, an analysis of the indictment here shows that the conviction may be sustained under either view of the statute for two separate reasons. Thus the issue petitioner tenders is not squarely presented, even though the court below discussed it at length. The first count of indictment charged (Pet. 7a):

> That during the period from on or about the first day of November, 1968, to on or about the 15th day of January, 1969, the exact dates being to the Grand Jury unknown, in the District of Colorado, Michael Anthony Tomeo, being engaged in the business of betting and wagering, did knowingly *use and cause the use of a wire communication facility* that is, the interstate telephone, *for the transmission* in interstate commerce from Monroe, Wisconsin, to Denver and Adams County, Colorado, *of information assisting in the placing of bets and wagers* on sporting events and contests, *such information consisting of the point spread on college and professional football games and the actual placing of bets and wagers on such games*, all in *violation* of Title 18, United States Code, Section 1084. [emphasis added; Count Two is identical except for the dates involved]

The indictment thus charged that petitioner "cause[d] the use of * * * the interstate telephone, for * * * the actual placing of bets and wagers * * *."

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issues presented to this Court on the direct appeal. See the briefs of both parties in No. 772, O.T. 1963. There is thus no conflict between the decision of this Court in *Telephone News System* and the construction of Section 1084(a) by the court below.

This charge was proven by the evidence that petitioner, by providing Mr. Huber with his telephone number in Denver, had caused Huber to use the telephone to transmit his bets interstate. Thus petitioner's conviction must be sustained even if the Section is viewed as applying only to the sending, and not to the rereceiving, of wagering information.[3]

In addition, the statute not only prohibits the use of an interstate telephone "for the transmission * * * of bets or wagers" but also applies to the "transmission * * * of * * * information assisting in the placing of bets or wagers." Although petitioner would leave the impression that he was merely the passive recipient of the calls, the indictment alleged and the evidence showed that during the telephone conversations, petitioner himself sent—transmitted—as well as received, wagering information. In itemizing the

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[3] It is immaterial that Huber, not being in the business of wagering, could not himself violate Section 1084. In *United States* v. *Kelley*, 395 F.2d 727, certiorari denied, 393 U.S. 963, the Second Circuit considered this issue in sustaining a conviction for violation of Section 1084(a) under a substantially identical indictment and explained (395 F. 2d at 729):

> A person may be held responsible as a principal under 18 U.S.C. § 2(b) for causing another to do an act which would not have been criminal if directly performed by that other person. United States v. Lester, 363 F. 2d 68, 72-73 (6th Cir. 1966), cert. denied 385 U.S. 1002, * * *. The evidence showed that appellant told these bettors how to get in touch with him if they wished to make a bet and, therefore it was reasonable to expect that they would make interstate calls. This is sufficient to find that he "caused" the interstate calls. United States v. Scandifia, 390 F. 2d 244 (2d Cir. 1968); Bass v. United States, 324 F. 2d 168 (8th Cir. 1963).

wagering information transmitted during the interstate telephone calls, the indictment referred to "the point spread on college and professional football games * * *." As the witness Huber explained, he asked petitioner to furnish him with the point spread prior to calling back to place the bet. In providing this assistance, petitioner was undeniably the transmittor of information within the meaning of the statute. On this additional ground, the conviction must be sustained without reaching the issue whether Section 1084(a) applies to the mere receipt of wagering information.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

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